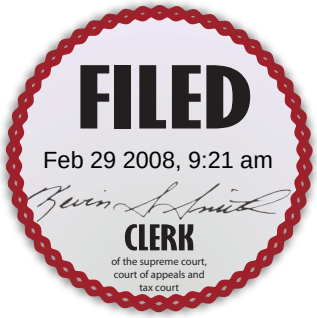

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IN THE
COURT OF APPEALS OF INDIANA

LEROY HOWARD, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0707-CR-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-9611-CF-1050

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Leroy Howard, Jr. appeals the sentence imposed by the trial court in 1998 after his plea of guilty to one count of dealing in cocaine, as a class A felony; and the State cross-appeals the trial court's grant of Howard's petition for permission to file a belated notice of appeal.

Finding the State's issue dispositive, we dismiss.

FACTS

On November 12, 1996, the State charged Howard with two counts of dealing in cocaine: Count I, for a transaction allegedly occurring on January 1, 1996, as a class B felony; and Count II, for a transaction allegedly occurring on March 8, 1996, and within 1,000 feet of a school, as a class A felony. On January 28, 1998, in exchange for the State's agreement to dismiss the first count, Howard pleaded guilty to the second count – the class A felony offense of dealing in cocaine. At sentencing on February 25, 1998, the trial court ordered Howard to serve a sentence of forty years, with ten years suspended.

On October 12, 2000, Howard filed a pro se petition for post-conviction relief. Subsequently, a State public defender appeared on his behalf. On September 3, 2002, counsel moved to withdraw (without prejudice) Howard's petition; the motion was granted.

On April 5, 2007, counsel for Howard filed a verified petition for permission to file belated notice of appeal. Therein, Howard stated that his delay in seeking to appeal "was not due to [his] fault as he was not advised" at his 1998 sentencing "of his right to appeal the sentence"; he "had had minimal contact with the legal system, his only prior

contact being a misdemeanor battery referral as a juvenile"; and he ha[d] been diligent in this cause." (App. 129). Without any hearing on Howard's petition, on May 14, 2007, the trial court ordered that Howard would be "permitted to file his Belated Notice of Appeal." (App. 133).

DECISION

In *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), our Supreme Court "made clear that the proper vehicle for raising a sentencing issue" on a conviction that resulted from the defendant's plea of guilty "was a direct appeal and not a post-conviction proceeding." *Moshenek v. State*, 868 N.E.2d 419, 421-22 (Ind. 2007). "Indiana Post-Conviction Rule 2(1) provides a defendant the opportunity to petition the trial court for permission to file a belated notice of appeal." *Id.* at 422. Upon a conviction after a plea of guilty and "fail[ing] to file a timely notice of appeal," the defendant may nevertheless file "a belated notice of appeal." P.C.R. 2(1). This procedure is available to the defendant

> where
> (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
> (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Id.

"The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal." *Moshenek*, 868 N.E.2d at 422-23. The fact that the trial court did not advise the defendant of the right to appeal a sentence after an "open plea" can establish that a defendant was without fault in the delay of filing a timely appeal. *Id.*

at 424. "However, a defendant still must establish diligence." *Id.* Several factors are relevant to the "diligence" inquiry, including "the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties." *Id.*

Where the trial court held a hearing on the defendant's petition for permission to file a belated appeal, the trial court's ruling thereon "will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as 'abuse of discretion')." *Id.* at 423-24. This follows because the trial court "is in a better position to weigh evidence, assess witness credibility, and draw inferences." *Id.* at 424. However, where there is no hearing held, we owe "no deference to the trial court's factual determinations because they were based on a paper record." *Id.* Thus, as we recently stated, "when the allegations contained in the motion itself provide the only basis in support of a motion, we review the decision *de novo*." *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*.

It is true, as Howard notes, that in his petition for post-conviction relief filed in 2000, he had raised the issue of his sentence, *inter alia*. However, the record reflects that at his request, the petition was dismissed without prejudice in September of 2002. Howard offers no evidence of his efforts to seek review of his sentence between then and when *Collins* was decided in September of 2004. Moreover, Howard's petition seeking permission to file a belated notice of appeal was not filed until more than two-and-one-half years after *Collins*. His petition asserts his "minimal contact with the legal system," as being limited to "a misdemeanor battery referral as a juvenile." (App. 129). However,

Howard's incarceration since 1998 had provided him with access to legal information and resources, which he had apparently utilized to draft and present legal arguments in support of his petition for post-conviction relief. Howard's petition for permission to file belated notice of appeal and affidavit offer no other specific factual assertions, such as (1) why Howard only "recently learned" of the *Collins* holding, or (2) Howard's efforts during the years since *Collins* to move forward in seeking to file a belated notice of appeal, or (3) that efforts in this regard were delayed due to the actions of others.

Based on the record before us, we find that Howard did not establish that he was without fault and had exercised diligence such that his petition to file a belated notice of appeal should be granted. Therefore, Howard's appeal is dismissed.

Dismissed.

BAKER, C.J., and BRADFORD, J., concur.